STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

NEW CASTLE COUNTY VO-TECH. EDUCATION ASSOCIATION Petitioner	)	
v.	)	U.L.P. NO. 88-05-025
NEW CASTLE COUNTY VO-TECH. SCHOOL DISTRICT Respondent	)	

HEARING OFFICER:

Charles D. Long, Jr., Esq.

APPEARANCES:

Barry M. Willoughby, Esq. - Counsel for the Association

Jeffrey M. Weiner, Esq. - Counsel for the District

Rudy Norton - UNISERV Representative, DSEA

Dr. Conrad Shuman - District Superintendent

Dr. Dennis Loftus - District Assistant Superintendent

DECISION

The New Castle County Vo-Tech. School District (hereinafter the "District") is a public employer within the meaning of 14 Del.C. section 4002(m). The New Castle County Vo-Tech. Education Association (hereinafter the "Association") is the exclusive representative of the public employer's certificated professional employees within the meaning of 14 Del.C. section 4002(h).

FACTS

On February 11, 1988 the parties commenced negotiations over the terms of a successor agreement to the collective bargaining agreement which was to expire on June 30, 1988. The parties met on six (6) occassions, the first occurring on February 11th. During this meeting the parties agreed to ground rules governing the negotiation process. Subsequent bargaining sessions of eight (8) hours each were held on March 15th, 16th, and 17th and on April 13th. At this point, having failed to reach agreement, the parties exchanged their last best offers. The District's offer was rejected by a vote of the Association's members on April 13th and the Association's offer was rejected by the Board of Education on April 25th. A final bargaining session took place on April 26th; however, no further progress was made.

On April 27th the parties jointly requested the Public Employment Relations Board to appoint a mediator to assist in resolving their differences.

The unresolved issues included Section 9.12, of the existing collective bargaining agreement, which provides:

> Blue Cross Blue Shield
>
> State pays for individual membership and the district pays 100% of family plan beginning with employment. Eligibility based upon 30 hours of employment per week. State share continues during retirement.

On May 20th, prior to the involvement of the mediator, Dr. Conrad Shuman, the District Superintendent, sent a letter to all staff members advising them that effective July 1, 1988, Blue Cross/Blue Shield was increasing its family protection premium from $58.50/mo. to $77.58/mo. for the comprehensive plan and from $50.48/mo. to $90.82/mo. for the HMO option. Dr. Shuman's letter also advised the employees that Blue Cross/Blue Shield had refused the District's request that the premium increase be held in abeyance pending the conclusion of the negotiations. Dr. Shuman informed the employees that although the District would continue to pay the current premiums, the respective monthly increases of $19.08 and $40.34 would be the responsibility of the employees, if continued family coverage was desired. The letter also informed the employees that Mr. Arnold Olsen, of the Insurance Commissioner's Office, had advised the District that employees who declined to sign the authorization form would likely be placed in the Basic Coverage Plan and would not be able to reinstate their family coverage until such time as Blue Cross/Blue Shield declared a re-opening period allowing all eligible State employees to change their existing coverage. A deduction authorization form accompanied each

letter.

In a letter dated May 24, 1988, the Association advised its members not to sign the deduction authorization form; however, on May 25th, the Association changed its position and advised those members who desired to continue family coverage to sign the form and add the phrase "Subject to the outcome of the unfair labor practice charge".

On May 27, 1988, the Association filed an unfair labor practice charge protesting the District's action.

POSITIONS OF THE PARTIES

Association:

The Association's argument is twofold: First, it argues that the District unilaterally altered the status quo by changing a term and condition of employment prior to the existence of a final legal impasse which it maintains does not occur until the impasse resolution procedures of mediation and fact-finding have been exhausted. The Association argues that to permit the District to unilaterally alter a term and condition of employment prior to the exhaustion of the statutory impasse resolution procedures would undermine those procedures to the extent that they would bcome meaningless; Secondly, the Association maintains that the status quo which the District unilaterally changed is the obligation to pay 100% of the monthly premium for family protection, as reflected in Section 9:12 of the collective bargaining agreement, and not merely the payment of the monthly premium existing at the expiration of the collective bargaining

agreement, as contended by the District.

District:

The District argues that impasse is defined at Section 4002 (j) of the statute as "the failure of a public school employer and the exclusive bargaining representative to reach agreement in the course of collective bargaining". Once a mediator is requested to assist in resolving the impasse, the collective bargaining process is completed and the employer is, therefore, entitled to institute whatever unilateral changes it desires. Alternatively, the District argues that, regardless of this right, it did not not unilaterally alter the status quo of a term and condition of employment, but merely continued the status quo after the expiration of the collective bargaining agreement, by continuing to pay the existing family plan premiums of $58.50 and $50.48 per month. Finally, the District argues that a ruling by the PERB favoring the Association and which directs the District to pay the increased premium, would violate Section 4006 (h) (2), of the Act, which prohibits the Public Employment Relations Board "either directly, or through a fact-finder, from mandating to the public school employer action which involves an economic cost to the public school employer".

ISSUE

Whether the New Castle County Vocational Technical School District committed an unfair labor practice in violation of 14 Del.C. sections

4007 (a) (1), (3), (5) and (6) [1] when during a period of negotiations for a successor agreement, it unilaterally discontinued paying 100% of the family health insurance premium and required its employees to pay the July 1, premium increase necessary to maintain their current level of benefits?

OPINION

The issue raises three important questions: First, when, if at all, may an employer alter the status quo by unilaterally changing a term and condition of employment; secondly, did the District improperly alter the status quo; and thirdly, if so, what limitation, if any, is imposed on the PERB'S remedial authority by Section 4006 (h) (2), of the Act.

Concerning the employer's right to unilaterally modify the status quo, the parties cite both private and public sector cases. Some of the public sector decisions incorporate private sector precedent. While such decisions may provide guidance, distinctions do exist between the private and public sectors and private sector case law does not,

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[1] It is an unfair labor practice for a public school employer or its designated representative to do any of the following:

> (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteeed under this chapter.
> (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
> (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive bargaining representative of employees in an appropriate unit.
> (6) Refuse or fail to comply with any provision of this chapter or with rules or regulations established by the Board [PERB] pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

therefore, necessarily provide an infallible basis for resolving similar issues in the public sector. Seaford Education Assn. v. Bd. of Education of Seaford School District, Del.PERB, ULP No, 2-2-84S (March 19, 1984).

In N.L.R.B. v. Katz, 369 U.S. 736 (1962), a private sector case cited by both the Association and the District, the United States Supreme Court held that an employer's unilateral change in a condition of employment which is being negotiation, prior to the onset of impasse, constitutes a per se violation of the employer's duty to bargain. The Katz principle, as it relates to pre-impasse changes, was adopted by the PERB in Appoquinimink Education Assn. v. Appoquininmink Bd. of Education (Del.PERB, ULP No. 1-2-84A (July 23, 1984)), a case involving the school district's unilateral freezing of the existing salary matrix after the expiration of the existing collective bargaining agreement but before impasse was reached. Similar holdings in both Brandywine Affiliate v. Brandywine Bd. of Education (Del.PERB, ULP No. 1-9-84-6B (November 20, 1984)), and Smyrna Educator's Assn. v. Smyrna Bd. of Education (Del.PERB, ULP No. 87-08-015 (October 26, 1987) likewise involved unilateral actions occurring prior to the parties having reached a state of impasse.

The current issue raises for the first time the question of an employer's right to alter the status quo after statutory impasse has occurred. The controlling statute is the Public School Employment Relations Act ("the Act"), passed by the state legislature in 1983. Section 4002 of the Act provides the following relevant definitions:

> (e) "Collective Bargaining" means the performance of the mutual obligation of a school employer through

its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached. However, this obligation does not compel either party to agree to a proposal or require the making of a concession.

(j) "Impasse" means the failure of the public school employer and the exclusive bargaining representative to reach agreement in the course of collective bargaining.

(k) "Mediation" means an effort by an impartial third party confidentially to assist in reconciling an impasse between the public school employer and the exclusive bargaining representative regarding terms and conditions of employment.

The statutory definitions are clear and unambiguous on their face. Collective bargaining imposes upon the parties the mutual obligation to confer and negotiate in good faith with respect to terms and conditions of employment and to reduce to writing any agreements reached. Impasse is the failure of the parties to reach agreement, as to terms and conditions of employment, in the course of collective bargaining. Mediation is the confidential effort of an impartial third party to assist in resolving an impasse. The institution of mediation does not signal the end of the collective bargaining process; rather, it constitutes a vital step in the continuing process of good-faith bargaining, a process which continues from the inception of bargaining,

through the impasse resolution procedures, until a written agreement is executed.

There is no statutory basis upon which to conclude that impasse, a prerequisite for mediation, also permits the employer to unilaterally alter the status quo. To the contrary, such a conclusion would be inconsistent with the declared policy of the State and the purpose of the statute which is to "...promote harmonious and co-operative relationships between reorganized public school districts and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public school system". 14 Del.C. Section 4001.

The District's reliance on Katz, (Supra.), to support such a right is misplaced. 14 Del.C. Section 4016, Strikes Prohibited, sub-section (a) provides that "No public school employee shall strike while in the performance of his or her official duties." The integrity of the collective bargaining process is of crucial importance and, if it is to be maintained, the statutory prohibition on self help must necessarily impose upon the employer a correlative duty to refrain from altering terms and conditions of employment during the course of negotiations. This duty is greater in the public sector than in the private sector where employees have a means to balance the relative bargaining positions of the parties by exercising their right to strike, a right expressly precluded by the Delaware statute.

It is an unfair labor practice for an employer to "refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate bargaining unit." 14 Del.C. Section 4007 (a) (7). A necessary condition

thereof is that the employer refrain from imposing unilateral changes in terms and conditions of employment during negotiations. The status quo of a term and condition of employment is only subject to change through the collective bargaining process.

This holding is not without exception. Public employers are protected by the statutory definition of terms and conditions of employment which excludes "those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public school employer". 14 Del.C. section 4001. In addition, Section 4005, of the Public School Employment Relations Act, does not require public school employers to bargain" matters of inherent managerial policy, specifically "including but not limited to such areas of discretion or policy as the functions and programs of the public school employer, its standards of services, overall budget, utilization of technology, organizational structure, curriculum, discipline, and the selection and direction of personnel". It is also foreseeable that other circumstances may arise which are sufficiently compelling so as to constitute an exception to the decision reached today.

Having so concluded, it is necessary to determine if the unilateral decision of the District not to pay the increased monthly premiums did, in fact, alter the status quo. While an employer may genuinely desire to reach agreement and bargain in good-faith to that end it may, nevertheless, engage in conduct which constitutes a per se refusal to bargain as to a particular mandatory subject of bargaining. Brandywine Affiliate NCCEA/DSEA/NEA v. Brandywine School District Board of Education, U.L.P. No. 1-9-84-6B (1984). There is no convincing

evidence that the New Castle County Vocational Technical School District was motivated by anything other than well-meaning intentions to adopt changes which it considered appropriate. However, the importance of maintaining the prevailing terms and conditions of employment during the period until new terms and conditions are reached by agreement is fundamental to creating an environment in which collective bargaining can most successfully be undertaken. Unilateral disruptions of this status quo are held to be unlawful because they frustrate the objective, provided for by statue, of establishing working conditions through collective bargaining..... Stability during the interim period between collective bargaining agreements is crucial to continuing the orderly and uninterrupted operations of the public school system and to maintaining an environment where the parties are free to negotiate in good faith on an equal basis. [Appoquinimink Education Assn., Supra.]

In support of its position to the contrary, the District cites a 1982 Chancery Court case, New Castle County Vocational Technical Education Assoiciation v. Board of Education of the New Castle County Vocational Technical School District (451 A.2d). There, in a similar factual setting, Vice Chancellor Longobardi denied the Association's request for injunctive relief for the reasons that there was no evidence of imminent necessity nor was there irreparable harm to be suffered by the plaintiff in light of the modest amount the employees would be required to pay and the fact that if the school board actually refused to pay the increase the demages suffered by the employees were easily identifiable and a money judgement would make them whole. In so deciding, the Court declined to rule on the merits of the dispute,

commenting that "The letter did not say the payments would not be continued by the Board. It said they may not continue...If the Board discontinues the payment and this Court has jurisdiction of the case, it will look closely at the question of whether the collective bargaining process has been undermined".

We are concerned here not with the extension of a clause of an expired collective bargaining agreement, but rather the maintenance of the relationship existing between the parties at the time the collective bargaining agreement expired. Where a prior agreement specifically addresses the term or condition of employment at issue, it may provide insight into the nature of the underlying relationship itself. Appoquinimink, (Supra.). In Section 9.12 of the expired collective bargaining agreement, the District did not commit to paying a fixed, or even a floating number of dollars. The contract language clearly sets forth the intentions of the parties. The District agreed to pay 100% of the family coverage premium. At the time the bargain was struck the District had no way of knowing what the amount necessary to maintain the negotiated level of benefit might be. By agreeing to pay 100% of the cost of family coverage during the term of the agreement it committed to, and thereby established, the relationship of providing family protection at no cost to the employee.

Confronted with a similar medical premium increase, the New York PERB determined that the cost of medical coverage provided by an employer is as much a part of the overall compensation package of its employees as are salaries, themselves. Town of Chili v. AFSCME, New York Council 66, 16 N.Y. PERB 4597, (1983).

The key is to recognize that stability during the interim period

between collective bargaining agreements is crucial to continuing the orderly and uninterrupted operations of the public school system and to maintaining an environment where the parties are free to negotiate in good faith on an equal basis. The status quo, as it relates to the payment of medical insurance premiums, includes not only the dollar amount contributed by the employer but also the amount of money, if any, paid by the employees. Any unilateral change in this relationship constitutes an impermissable change in the status quo through the alteration of a term and condition of employment and, therefore, violates the Act.

Finally, concerning the limitation upon the PERB to remedy the violation, I find none in Section 4006 (h) (2), as alleged. This decision contains no mandate by the PERB of any affirmative action, with or without economic cost, to the public school employer. It does nothing more than maintain the status quo, as it existed at the expiration of the collective bargaining agreement, by enforcing the original obligation voluntarily undertaken by the employer. Although the return to the status quo will require the District to initially absorb the increased premium cost, the subject of health care, including the level of contribution, remains an issue in the continuing negotiations. Ultimately, the level of contribution must be determined through the collective bargaining process, as required by the statute, and not by one party unilaterally imposing its terms upon the other.

CONCLUSIONS OF LAW

1. The New Castle County Vocational Technical School District is a

Public School Employer within the meaning of Section 4002 (m), of the Public School Employment Relations Act, 14 Del.C. Chapter 40.

2. The New Castle County Vocational Technical Education Association (DSEA/NEA) is an Employee Organization within the meaning of Section 4002 (g), of the Public School Employment Relations Act, 14 Del.C. Chapter 40.

3. The New Castle County Vocational Technical Education Association (DSEA/Nea) is the Exclusive Bargaining Representative of the School District's certificated professional employees within the meaning of section 4002 (h), of the Public School Employment Relations Act, 14 Del.C. Chapter 40.

4. When, during the period of negotiations for a successor agreement, the New Castle County Vocational Technical School District unilaterally discontinued paying 100% of the premium for family health insurance and required its employees to pay the full increase in family care premiums necessary to maintain their current level of benefits it engaged in conduct which constitutes an impermissible change in the status quo and is a per se violation of Sections 4007 (a) (5) and (6), of the Act.

5. There is insufficient evidence on the record to warrant a finding that the conduct set forth above violates Sections 4007 (a) (1) or (3), of the Act.

REMEDY

Pursuant to Section 4006 (h) (2), of the Act, the New Castle County Vocational Technical School District is ordered To:

1. Cease and desist from:

    a. Unilaterally requiring its employees, during the period of negotiations for a successor agreement, to pay the increase in family health insurance premiums necessary to maintain their current level of benefits.

2. Take the following remedial action:

    a. Reinstate the payment of 100% of the family health insurance premiums, effective with due date for the September premium.
    b. Not later than September 30, 1988, reimburse all eligible employees for whom the New Castle County Vocational Technical Education Association is the exclusive bargaining representative the amount of the July and August, 1988, contribution necessary to maintain the family health insurance coverage.
    c. Within ten (10) calendar days from the date of receipt of this decision, post a copy of the attached NOTICE OF DETERMINATION in each school within the District at places where notices of general interest to teachers

are normally posted. This notice shall remain posted for a period of forty-five (45) days.

d. Notify the Public Employment Relations Board in writing within thirty (30) calendar days from the date of this Order of the steps taken to comply with the Order.

IT IS SO ORDERED.

Charles D. Long, Jr.

CHARLES D. LONG, JR.
Executive Director
Delaware Public Employment
Relations Board

D. Murray-Sheppard

DEBORAH L. MURRAY-SHEPPARD
Principal Assistant
Delaware Public Employment
Relations Board

DATED: August 19, 1988